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THE FUTURE OF GAMBLING IN INDIAN COUNTRY

Gary Sokolow*

Background and Scope

This article will analyze the legislative and legal issues that arise from gambling on Indian reservations. First, a general overview of Indian country gaming will be presented. Next, the federal government's attempt, through existing laws and proposed legislation, to deal with this situation will be discussed. A review of pending legislation will be emphasized. The existing case law will then be analyzed. Finally, an analysis of competing federal, tribal and state interests in gambling regulation will be discussed, followed by a look at future prospects.

The federal government has regulated gambling in Indian country only since 1924. Traditional Indian games were not the focus of these regulations. In that year, the Bureau of Indian Affairs (BIA) adopted tribal gaming ordinances for the purposes of its Code of Federal Regulation Courts.¹ Only recently has Indian gaming become a significant economic activity in Indian country.

In a June 17, 1986 survey, the Department of the Interior reported that 108 tribes had gaming facilities, 104 of them involving bingo.² Some tribes operate both bingo and card games, and others run only card games.³ No tribes are currently known to operate pari-mutual dog racing, horse racing, or jai-alai. Gross receipts of all tribes conducting such activities exceeds \$100 million annually.⁴

The tribes, like other governmental entities, use these revenues largely for the economic, educational, and health benefit of their members. The expansion of gaming into Indian country and the recent proliferation of court decisions on the subject have aroused the interest of both the states and the Congress.

* J.D., 1988, University of South Dakota. First place award, 1987-88 *American Indian Law Review* Writing Competition.

1. S. REP. No. 493, 99th Cong., 2d Sess. 2 (1986).

2. *Id.*

3. *Id.*

4. *Id.* at 3.

*Federal Regulation of Gambling in Indian Country**Assimilative Crimes Act (ACA)*

To date, Congress has not seen fit to directly regulate Indian gambling activities. However, the federal government is not without remedies to apply against the existence of such operations. These so-called "remedies" are in the form of criminal prosecutions, which seek to ban such activities, rather than merely regulate the time, place, and form of gambling. The first such possible "remedy" is the Assimilative Crimes Act (ACA), which allows federal officials to punish those crimes which are not included in the federal criminal code, by applying the applicable state law.⁵ The ACA is an interstitial measure, reflecting the fact that the states, and not the federal government, are the usual arbiters of criminal conduct.⁶ At least one commentator has suggested, however, that the ACA is not an independent basis of federal jurisdiction over these activities.⁷ He suggested that the ACA is applicable to Indian reservations only through the General Crimes Act (GCA),⁸ subjecting it to the exceptions of the GCA, and as a result, since non-Indian matters are exempt from GCA coverage, the ACA would therefore not then apply to non-Indians.⁹

This interpretation is not unanimously accepted. Another writer takes the view that the ACA is a mere transformation of state law into federal law.¹⁰ Under this view, federal regulation would simply turn on whether a state had outlawed such activity. Federal officials would then have to regulate gambling activity on a state-by-state basis, determining whether or not that state regulated or prohibited gambling. Such an analysis will be discussed later, in the context of Public Law 280¹¹ and the civil/regulatory - criminal/prohibitory analysis. The ACA is not a very solid basis on which to regulate Indian gambling. The word "regulate" implies some form of permission, as opposed to the outright ban of the activity in question.

5. Assimilative Crimes Act, 18 U.S.C. § 13 (1969).

6. *United States v. Marcy*, 557 F.2d 1361, 1364 (9th Cir. 1977).

7. Guzman, *Indian Gambling on Reservations*, 24 ARIZ. L. REV. 209, 212 (1982).

8. General Crimes Act, 18 U.S.C. § 1153 (1988).

9. Guzman, *supra* note 7, at 212.

10. Comment, *Indian Sovereignty Versus Oklahoma's Gambling Laws*, 20 TULSA L.J. 605, 622 (1985).

11. Pub. L. 280, 67 Stat. 588 (codified in 18 U.S.C. § 1162(a), 28 U.S.C. § 1360(a)) (1984).

Gambling Devices Act

Another form of federal control of gambling, albeit a specialized one, is the Gambling Devices Act (GDA), which generally bans the use of certain gambling devices.¹² The GDA specifically prohibits the use of such devices as slot machines in Indian country.¹³ However, the GDA prohibits only certain gambling paraphernalia, not the conduct of games per se. But if the federal government wants to stop the use of slot machines, for example, this act effectively cripples such gaming operations. That is what occurred in *United States v. Sousseur*.¹⁴ However, *Sousseur* relied on the ACA to allow the seizure of slot machines, since state law prohibited the use of such equipment. In *Sousseur*, neither the United States nor the tribe had such a law or ordinance prohibiting the use of slot machines.¹⁵

Two federal cases which have construed the GDA held that while the United States may seize such gambling devices on Indian reservations, the GDA does not extend to the regulation of the conduct of gambling itself.¹⁶ The GDA, like the ACA, is of limited application, especially in the bingo context, as many of the games do not utilize such equipment as the GDA defines.

Organized Crime Control Act of 1970

A far more potent weapon in the hands of federal regulators is the Organized Crime Control Act of 1970 (OCCA),¹⁷ which is a general federal law of national application prohibiting large scale gambling. The OCCA makes it a federal crime to operate a gambling business "that is a violation of the law of a state . . . in which it is conducted."¹⁸ As its name implies, the OCCA was passed largely to take aim at organized crime.¹⁹ There is nothing in its legislative history which suggests that the authors of the act had Native American gambling activities in mind.²⁰ The wording of this statute raises two issues concerning its enforcement in Indian country.

12. Gambling Devices Act, 15 U.S.C. § 1171-1178 (1982).

13. *Id.*

14. 87 F. Supp. 225 (W.D.Wis. 1949).

15. *Id.*

16. *United States v. Blackfeet Tribe*, 369 F.Supp. 562, 565 (D.Mont. 1973); *United States v. Farris*, 624 F.2d 890, 896 (9th Cir. 1980).

17. 18 U.S.C. § 1955 (1974).

18. *Id.*

19. H.R. REP. No. 1549, 91st Cong., 2d Sess § 2 (1970).

20. Guzman, *supra* note 7, at 212.

The first question concerns infringement on the "ability of tribes to make their own laws and be governed by them"—the *Williams v. Lee*²¹ infringement test. The Sixth Circuit, in *United States v. Dakota*, decided that the OCCA applies to Indian country in Michigan because the OCCA extends federal, not state jurisdiction into Indian country, thus precluding any infringement of state authority over Indian tribes.²² That case found that the infringement test did not apply because the *Williams* test concerns state and not federal government infringement upon tribal sovereignty.²³ *Dakota* merely followed the prevailing analysis on this issue. The court also upheld the enforcement of the OCCA in Indian country, since the elements of the crime as set forth in the OCCA and the relevant state law were present.²⁴

The second question involved is whether a general federal law such as the OCCA can be applied in Indian country, absent a clear indication by Congress to that effect. *United States v. Farris*, a Ninth Circuit case, held that the OCCA does apply in Indian country.²⁵ The court simply reasoned that unless Congress says to the contrary, federal laws apply with equal force in Indian country.²⁶

The implications raised in this second question in *Farris* are not nearly so clear as is the infringement issue. To take the *Farris* holding to its logical conclusion further modifies the well-established case law, which holds that tribes (at least those federally-recognized) possess some measure of inherent sovereignty. Tribal sovereignty is again curtailed. To hold that all federal laws apply, unless specifically exempted by Congress, greatly diminishes inherent tribal sovereignty. No nation expects to live by another sovereign's laws without that nation's consent. Nonetheless, the *Farris* view, echoing *United States v. Montana* and *United States v. Wheeler*, is the prevailing view on that point.²⁷ Finally, *Farris* found that Congress never intended to allow Indians to freely engage in the very gambling activities that it forbade other citizens.²⁸

21. *Williams v. Lee*, 358 U.S. 217 (1959).

22. *United States v. Dakota*, 796 F.2d 186, 188 (6th Cir. 1986).

23. *Dakota*, 796 F.2d at 188.

24. *Id.*

25. *United States v. Farris*, 624 F.2d 890, 890 (9th Cir. 1980).

26. *Id.* at 893-94 (quoting *United States v. Wheeler*, 435 U.S. 313 (1978) and *United States v. Montana*, 604 F.2d 1162 (9th Cir. 1979)).

27. *Id.*

28. *Id.* at 894.

The Public Law 280 status of a state is not a factor which affects the applicability of the OCCA in Indian country. But we need not apply the prohibitory/regulatory dichotomy to the OCCA to determine whether or not gambling activity violates state law. *Dakota* and *Barona Group of Capitan Grande Band of Mission Indians v. Duffy* confirmed this, the latter case holding that the true test of the applicability of the OCCA is "whether [the] tribal activity is [a violation of state law] . . . depends on whether it is contrary to the public policy of the state."²⁹

It should be realized that the OCCA, like the ACA and the GDA, does not give states themselves the right to enforce these laws, which would give rise to infringement problems. There is nothing in any of these acts which suggests that states may use them to enforce their own statutes, even though the ACA and the OCCA borrow state law in order to find violations of federal law. This "borrowing" of state law is consistent with constitutional and case law, which gives Congress "plenary" powers to regulate dealings with the Indian tribes.³⁰ To date, the United States Department of Justice has not vigorously enforced the OCCA, perhaps because recent federal policy supports tribal economic self-sufficiency.³¹

Proposed Congressional Regulation

Ninety-Eighth Congress

Only in the last few years has Congress moved to regulate gambling activity on Indian reservations. Congressional interest in this issue began in the Ninety-Eighth Congress with House Bill 4566, which sought to impose federal licensing requirements on Indian gambling enterprises, with a governmental commission within the Interior Department supervising the entire scheme.³² The operation of this legislation was somewhat analogous to the Nevada Gaming Commission, which closely regulates the employment of workers, the licensing of gambling establishments, and the operating rules of the gaming industry. The Nevada commission also requires extensive disclosure of employee and operator financial interests.

29. *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185, 1190 (9th Cir. 1982), *cert. denied* 461 U.S. 929 (1983); *Dakota*, 796 F.2d at 188.

30. See e.g., *Lonewolf v. Hitchcock*, 187 U.S. 553 (1903); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

31. 19 WEEKLY COMP. PRES. DOC. 98 (Jan. 24, 1983).

32. H.R. 4566, 98th Cong., 1st Sess. (1983).

House Bill 4566 was introduced in response to *Seminole Tribe of Florida v. Butterworth*, which held that under certain circumstances, states cannot regulate bingo on an Indian reservation.³³ This bill died in committee and it was not heard from again in that Congress. Support for the bill was decidedly mixed among Indian communities. One group of tribes supported it as a clarification of existing law.³⁴ Other groups opposed it on grounds of infringement upon tribal sovereignty.³⁵

Ninety-Ninth Congress

In 1985, with the Ninety-Ninth Congress, several bills on this subject were again introduced. The most noteworthy were Senate Bill 902, Senate Bill 2557, and House Bill 1920. Senate Bill 902 established certain federal standards for Indian gaming, with Secretarial approval required of tribal ordinances and management contracts.³⁶ A gambling commission was also established in that bill, but its powers and structure were not delineated. The standards for the tribal gaming ordinances and resolutions required that they be "at least as restrictive as [the] prevailing state law."³⁷ Thus, the tribe might as well adopt the state law on the subject, as it is left with no real choice of its own.

Much more comprehensive in scope than Senate Bill 902 was House Bill 1920, which set up a National Indian Gaming Commission, acting for the Secretary of the Interior, which again was required to approve of tribal ordinances and management contracts. This legislation also required that revenues generated from the gambling on the reservation only be used to support tribal governmental functions.³⁸ In this bill, for the first time, three classes of gambling were established: Class I covered the traditional Indian forms of gaming and gave the tribes exclusive jurisdiction to regulate them; Class II included such games as bingo, which required commission approval of ordinances regulating same, thus giving the tribes and federal government concurrent jurisdiction over such gaming; and finally, Class III gaming included all other forms of gambling such as pari-mutual

33. *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981).

34. *Indian Gambling Control Act: Hearings on H.R. 4566 Before the Committee on Interior and Insular Affairs, House of Representatives*, 98th Cong., 2d Sess. 96-97 (1984) [hereinafter *House Hearings*].

35. *Id.* at 101.

36. S. 902, 99th Cong., 1st Sess § 11 (1985).

37. *Id.* at §§ 5-6.

38. H.R. 1920, 99th Cong., 2d Sess. § 11(b)(2)(i)-(iv) (1986).

wagering on horse and dog racing, and jai-alai.³⁹ The jurisdictional aspects of Class III gambling are unclear from a reading of the bill.

Under House Bill 1920, the review of management contracts was the second area of major authority given the commission.⁴⁰ Evidently, there had been some overreaching by outside (non-tribal) management firms hired to run the gambling enterprises. Such overreaching occurred when the outsiders took a disproportionate share of the profits, when they did not account to the tribes for their income, and when they signed contracts for an unduly long period of years. On this last point, one case of a twenty-year contract term has been reported. House Bill 1920 curbs overreaching by setting a maximum contract term of five years, requiring strict accountability standards, and excluding felons from participating in these enterprises.⁴¹ Under this bill, a member of the tribe's governing body is excluded from having any interest in the management contract.⁴²

Finally, under House Bill 1920 a tribe need not be federally recognized to be subject to this bill. It is sufficient for the tribe merely to be eligible for services provided Native Americans by the Secretary of the Interior.⁴³ These two definitions are not necessarily the same. The latter one broadly includes those tribes ineligible for, or that may have not yet completed, the BIA's formal tribal acknowledgment process, but nonetheless under certain statutes qualify for certain services. Native Hawaiians are an example of one group who do not qualify for federal recognition as an Indian tribe, yet they are eligible for certain Native American programs administered by the Secretary of the Interior. Lands which fall subject to this bill include Indian reservations and, under certain circumstances, newly acquired tribal lands.

The Reagan Administration then had Senate Bill 2557 introduced as its answer to the emerging problems of Indian gambling.⁴⁴ This measure was a response to the perceived inadequacies of House Bill 1920. Assistant Attorney General John Bolton, in summarizing his objections to House Bill 1920, cited a lack of

39. *Id.* at 19(5)(A)-(C).

40. *Id.* at § 12.

41. *Id.* at § 12.

42. *Id.* at § 12(e)(1)(A).

43. *Id.* at § 19(4).

44. Jones, *Gambling on Indian Reservations - Update February 17, 1987*, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS (1987).

rigorous regulation in the form of strict licensing procedures and accounting and auditing procedures.⁴⁵

There were several significant differences between Senate Bill 2557 and other bills which came both before and after it. Under this bill, tribally operated bingo would be forbidden in any state which does not also permit bingo, an apparent answer to court holdings which have construed Public Law 280 in a gaming context. The commission's operating expenses would be assessed against the tribally operated bingo operations. A major difference between this bill and others was its concentration on bingo, to the exclusion of other forms of gambling. Senate Bill 2557 regulated gambling in terms of bingo and little else. The regulatory scheme established by House Bill 1920, however, was more detailed than in any bills previously considered.

Like House Bill 1920, Senate Bill 2557 provided criminal sanctions in Title 18 of the United States Code for violations. Unauthorized gambling offenses would be handled in a manner similar to the ACA, inasmuch as these sanctions would apply prevailing state law and subject the offender to the same punishment as the state would mete out for like offenses.⁴⁶ A separate section on theft carried its own fines and imprisonment sanctions.⁴⁷ These sanctions effectively created concurrent state and federal jurisdiction over violations of state gambling laws in Indian country. Specific language in Senate Bill 2557 delegated to the states the jurisdiction to try such cases, unless the "circumstances justify" a federal prosecution.⁴⁸ Justifiable circumstances were not further clarified in the legislation. Lastly, the bill created a special class of crimes, using state law, which granted concurrent jurisdiction in both the federal and state governments.

One Hundredth Congress

These bills also died in Congress, failing to either come up for a vote in the appropriate House and Senate committee, or to get a do pass committee recommendation for a full House and Senate floor vote. More recently, the 100th Congress considered Senate Bill 555, introduced on Feb. 19, 1987 by Senators Daniel Inouye (D.-Hawaii) and Thomas Daschle (D.-S.D.). Both serve on the Select Committee on Indian Affairs, the former as committee chairman.

45. *Id.*

46. S. 2557, 99th Cong. 2d Sess. § 401 (1986).

47. *Id.*

48. *Id.*

This bill was similar in form to the previous ones. Its authors justified it on the basis that the patchwork nature of Indian jurisdiction made application of criminal laws in Indian country somewhat unsettled. Further justification was the need to clarify the legal status of gambling in Indian country.⁴⁹ Inouye and Daschle also found the need to shield the tribes from the corrupting influences of organized crime (though only one such incident has been documented).

In the definitional section of the bill, "Indian lands" were defined as those within a reservation or held in trust by the United States for any person or tribe, or lands "held by any tribe or individual subject to restrictions by the United States against alienation and over which an Indian tribe exercises governmental power."⁵⁰ It is conceivable, then, that a gambling establishment could be put on land within the reservation which is owned by an individual tribal member, subject only to tribal jurisdiction. That individual would then be able to receive rent payments from that gaming operation on his land.

Under section 7 of this bill, a National Indian Gaming Commission would have wide-ranging powers to regulate the conduct of gambling. Only two of the five commission members must be members of a federally recognized Indian tribe. As a result, Indian gaming could be controlled by non-Indians. That possible result is clearly inconsistent with the often repeated federal policy of tribal self-determination. The Commission could conduct audits, inspect all books and gaming premises, and generally monitor Indian gaming activities.⁵¹

Like House Bill 1920, Senate Bill 555 established three classes of gaming, with the jurisdictional schemes remaining identical to the earlier bill. There were two requirements, however, for a tribe to engage in Class II gaming (bingo-type games). The first directed the tribe to enact an ordinance regulating such activity, and second, this gaming must not be of a type completely prohibited by a state.⁵² For the purposes of the bill, if a state permits gambling in some form, however limited, then the second requirement for Class II gambling would be met. Apparently, that requirement was designed with the prohibitory/regulatory Public Law 280 analysis in mind. Such activity would be prohibited in Indian country if the state in which the reser-

49. S. 555, 100th Cong., 1st. Sess. § 2 (1987).

50. *Id.* at § 4.

51. *Id.* at §§ 6-7.

52. *Id.* at §§ 4-5.

vation is located also prohibits it. The tribe may then regulate Class II gambling, subject to Commission supervision of certain details of the operation. A tribe must also meet the eligibility requirements for a state license. The conduct of Class III gambling would be made a violation of federal law, subject to some very narrow exceptions.⁵³

Another restriction upon tribal sovereignty imposed by Senate Bill 555 was the requirement that all gambling revenues be dedicated only to tribal governmental operations or for the welfare of individual tribal members, tribal economic development, other charitable organizations, or to help local government agencies fund their operations. This last point is analogous to a federal grant of impact funds to state and local governments in order to compensate them for the loss of tribal trust lands from the property tax rolls. Tribes may make per capita payments to members, subject to some restrictions: 1) the tribe must have a Secretarial-approved plan for allocation, and 2) all such payments are expressly made subject to the federal individual income tax.⁵⁴

Another significant portion of the bill provided for a transfer of tribal jurisdiction to the state, Public Law 280 notwithstanding, if the tribe elects to be freed from Commission regulation.⁵⁵ Any such transfer must be initiated by the tribe and then approved by the Secretary of the Interior, prior to it becoming effective.⁵⁶ The bill did not say whether the cessation of tribal jurisdiction is only in relation to civil and criminal incidents arising from the gambling enterprise.⁵⁷ Perhaps the ambiguities of this provision made it unlikely that the tribes would use it, fearing that such a consent will "open the floodgates" to the continued erosion of their sovereignty. Apparently, only Class III gambling transferred to state jurisdiction could be held exempt from state assessments for the costs of law enforcement, as long as the revenues derived therefrom are used solely for the general governmental purposes of the tribes.

Section 12 of the bill dealt with the issuance of management contracts, providing in part that contracts may not exceed a term of five years,⁵⁸ providing tribes a certain guaranteed min-

53. *Id.* at § 11(d).

54. *Id.* at § 11(b).

55. *Id.* at §§ 11(c), (d).

56. *Id.*

57. *Id.*

58. *Id.*

imum payment with a priority over the retirement of developmental and construction costs,⁵⁹ and strict financial disclosure (corporate and individual) accounting requirements.⁶⁰ The subsection dealing with the minimum guaranteed payment to the tribe was unnecessarily vague. It would allow the tribe to receive virtually nothing if the tribe became a victim of overreaching by an outside management company. A tribe, using its own consultants, could set up its own operation, with a minimum of outside help (at least one all-Indian consulting firm exists to do just that). A steadily increasing number of tribal members attending college would be equipped to make the tribes more self-sufficient, resulting in less dependence on outside help.

Section 14 dealt with civil penalties, allowing the commission chairman to fine and collect up to \$25,000 for violations of this act.⁶¹ The alleged violator could appeal such a levy to the full commission.⁶² This provision would probably be challenged in court for a built-in conflict of interest, as such fines collected would be used to defray the operating expenses of the commission. The same people fine, collect and expend the funds.

Section 15 of Senate Bill 555 provided an aggrieved defendant the right to appeal a commission-imposed fine to the appropriate federal district court and thence the usual appeals route.⁶³ Decisions made by the full commission regarding licensure, fines, and other related matters would be considered final agency decisions for the purposes of the Administrative Procedures Act.⁶⁴ The Commission was vested with investigative and subpoena powers, but the Attorney General would have the discretion to either enforce or decline to enforce such subpoenas.⁶⁵

Under section 18 of Senate Bill 555, the commission may tax, subject to certain limits, each tribal gaming operation to help defray its expenses.⁶⁶ If the tribe operates a thriving Class III gaming operation, it could reduce its tax burden by electing out of the commission's jurisdiction (and subsequent assessments) by requesting a transfer to state jurisdiction. A tribe might have a lower tax burden under state regulation. But the long run effect of such a move would bring with it some high costs, not

59. *Id.* at §§ 12(a)(2), (b).

60. *Id.*

61. *Id.* at §§ 14(a)(1), (b)(1).

62. *Id.*

63. *Id.* at §§ 14(b)(1), 15.

64. *Id.*

65. *Id.* at §§ 16-17.

66. *Id.* at §§ 17-19.

the least of which would be a further erosion of tribal sovereignty. This would be an additional state encroachment in what has been an exercise of that tribal sovereignty.

Section 20 of the bill permitted, only under very narrow circumstances, the establishment of a gaming operation on newly-acquired (after the enactment date of this act) Indian trust lands. There appeared to be only one exception to the requirement that tribal gaming operations be conducted on new trust lands: the governor of the state involved must give his consent, after determining that such a move would not be "detrimental to the surrounding community."⁶⁷

The effect of this section would likely foreclose a tribe obtaining land in a town or city, off the reservation, and then establishing a casino. A governor would probably accede to such a request only if 1) the area was economically depressed, 2) the tribe agreed to hire a significant number of non-Indian employees, 3) the gaming operation reimbursed the town or state for additional law enforcement expenses, and 4) it was politically safe or advantageous for the governor to do so. On this last point, there may be a great resentment against a tribe establishing what many non-Indians would perceive as an enterprise free of state taxation and regulation. Unfortunately for Native Americans, a vast amount of misinformation abounds regarding their political status as tribes. Citizens might not view such gubernatorial approval as a "righting of past wrongs," regardless of the nature of those wrongs.

At least tribes with an existing reservation could gain additional land with "gaming rights" through land acquired through the settlement of an outstanding land claim.⁶⁸ Terminated tribes restored to federal recognition could establish gaming houses on lands they re-acquire pursuant to such a re-recognition.⁶⁹ In the final analysis, an existing tribe such as the Oglala Sioux, for the purposes of gambling enterprises, would be subject to their present boundaries. The presumption built into Senate Bill 555 was that no newly acquired lands after the enactment of this bill could be used to establish any Class II or III gambling operations.

Section 23, the final major section of Senate Bill 555, addressed criminal sanctions for violations of this act. Unlike the previous bills that have been discussed, this section exempted

67. *Id.* at § 20.

68. *Id.*

69. *Id.*

Class I and II gaming already regulated by this act.⁷⁰ As did the other bills, this section likewise borrowed state law to see if a federal gambling offense has been committed.⁷¹ The major difference between this and previous bills was that the United States has exclusive criminal jurisdiction for violations of this act, with transfer of such jurisdiction to the state subject to tribal consent.⁷² To many tribes, this would surely be preferable to state jurisdiction, for historical reasons. Given the proliferation of Indian gaming enterprises, federal criminal sanctions would be sure to put additional burdens on the federal court and penal systems.

Under section 23, theft from gaming establishments by officers, employees, or any one else, was made punishable by fines up to \$250,000 and prison terms of up to five years.⁷³ These criminal provisions would make for an ever-increasing federal presence on the reservations.

At the time of this writing, this bill was pending in the Senate Select Committee on Indian Affairs. House of Representatives Bill 964, which was introduced at the same time as Senate Bill 555, was substantially the same as its Senate counterpart.

Competing Tribal, Federal, and State/Local Interests

Tribal Interests

The concerns which were expressed on earlier bills are the same as those expressed for the currently pending legislation. Fundamentally, the entire argument comes down to the competing interests of all three sovereigns: tribal, federal, and state/local.

The most obvious interests of the tribes on this issue is that of economic development. For example, the Florida Seminole tribe grossed \$20 million at all three of its bingo sites in 1982, with a net profit of \$2.7 million dollars returned to its 1500 members that year.⁷⁴ This is welcome news to those tribes who do not possess an abundance of natural resources. The ability to attract tourists and non-Indian residents alike to the reservation represents a feasible way for a tribe to stabilize its economy.⁷⁵ One tribe sees these gambling bills as a way to

70. *Id.* at § 23.

71. *Id.*

72. *Id.*

73. *Id.* at §§ 23-24.

74. DeDomenecis, *Betting on Indian Rights*, CALIF. LAWYER, Sept. 1983, at 29.

75. *Id.* at 31.

"legitimize" the tribes' efforts to become truly self-sufficient.⁷⁶

Aware of state concerns as to the stability of these enterprises, some of the tribes, such as the Fon Du Lac of Wisconsin, have enacted comprehensive bingo gambling ordinances which address many of the state and federal concerns of the bills.⁷⁷ It appears that the revenue raised from these ongoing enterprises is used to benefit the welfare of tribal members, through tribal expenditures on the health, welfare, and education of tribal members. Unfortunately, at the time of this writing, there is no survey available which indicates precisely how the gambling revenue earned by the various tribes is used. It is not doubted that gambling activities are potentially able to provide employment for members, and in turn, allow increased spending by both the tribe and its members, on and off the reservation. Indeed, tribes such as the small Cabazon Band of Mission Indians count such gambling revenues as its only source of income independent of state or federal government aid.

Tribal sovereignty is the final major Indian interest to be addressed here. The dilution of tribal powers as embodied by these bills is viewed by the tribes as the major problem with this legislation.⁷⁸ From the foregoing analysis of these bills, it is evident that just such a weakening of meaningful tribal self-determination may occur. Another layer of bureaucracy would be added within the federal government to "check up" on tribal activities. Federal or state standards, not tribal standards, would apply to the evaluation of prospective Indian gaming ordinances adopted pursuant to this legislation. These bills reach beyond mere Secretarial approval of tribal council ordinances to an ongoing audit and regulation of what are essentially those types of activities usually termed governmental police powers: those of regulating the conduct of business, social, or other enterprises on the reservation.

But at least one Indian group, a body of tribal chairmen solicited by the Interior Department for a study of this issue, did not view this legislation as an incursion into tribal sovereignty.⁷⁹ Instead, they saw these bills as a way to protect tribal government rights.⁸⁰ Just how that would be accomplished was not explained.

76. *Gambling on Indian Reservations and Land: Hearings on S. 902 Before the Senate Select Committee on Indian Affairs*, 99th Cong., 2d Sess. 83-85 (1985) [hereinafter *Senate Hearings*].

77. *Id.*

78. H.R. REP. NO. 488, 99th Cong., 2d Sess. 23 (1986).

79. *Senate Hearings*, *supra* note 76, at 84.

80. *Id.*

Federal Interests

In fact, President Reagan embraced the Nixon Administration's goal of meaningful tribal self-determination.⁸¹ It would appear that encouraging Indian gambling activities would accomplish just that. In a 1983 statement of federal Indian policy, Reagan encouraged tribes to reduce their dependence on the federal government by developing their economies, and in turn, their governments.⁸² Some people might view this statement as another attempt at termination of the federal-Indian trust relationship. Unfortunately, his statement offered little help in clarifying his views on gambling activities as a road to self-sufficiency. The President discussed self-sufficiency largely in terms of a tribe's natural resources, the lack of which seems to serve as the impetus for gambling activities on the reservations.⁸³ A rough pattern emerges here in that those tribes which already have abundant natural resources appear to have little interest in conducting gambling activities.

Unfortunately, there does not seem to be a unified federal response to this issue. While the BIA seems to favor Indian gambling as a means to self-sufficiency,⁸⁴ the federal courts and the Justice Department raise the specter of an infiltration of organized crime into Indian country.⁸⁵ This fear of organized crime is a recurring theme in the federal government's support of this legislation.⁸⁶ These same would-be federal regulators do not see the tribes as efficient self-regulators against this threat.⁸⁷ Yet to continually deny the tribe's ability to protect themselves undermines the very policy of meaningful self-determination. If the tribes are not seen as possessing abilities to be self-policing, then self-determination is virtually impossible. Mistakes made by the tribes in exercising their inherent sovereign powers serve as a pretext for the federal government to further limit their exercise of those dormant powers. Self-determination then becomes a mockery.

Congressman Norman Shumway (R.-Calif.), a prime sponsor of this legislation, makes much of this organized crime threat.⁸⁸

81. 19 WEEKLY COMP. PRES. DOC. 98 (Jan. 24, 1983).

82. *Id.* at 99.

83. *Id.* at 100-01.

84. DeDomenecis, *supra* note 74, at 30.

85. *United States v. Farris*, 624 F.2d 890, 895 (9th Cir. 1980); *see also House Hearings*, *supra* note 34, at 67.

86. *House Hearings*, *supra* note 34, at 67.

87. S. REP. No. 493, 99th Cong., 2d Sess. 28 (1986).

88. Letter from U.S. Rep. Norman Shumway to Gary Sokolow (Mar. 2, 1987).

His district includes several rancherias which conduct gambling activities. He bases his conclusions of organized crime infiltration on reports by the California Attorney General's office.⁸⁹ His thoughts are but reflections of a lack of direction of federal policy makers in this area. On one hand, he supports the Indian effort to become self-reliant, but then he is concerned with possible crime problems.⁹⁰

State Interests

There are two state interests affected by gambling in Indian country. The first is that of organized crime, as much a concern of states as it is the federal government. In *California v. Cabazon Band of Mission Indians*,⁹¹ the state expressed concern that some non-Indian operators of one tribe's gambling operations were convicted in state court of murder and bribery.⁹² This citation of organized crime infiltration into Indian country is the only one documented. Despite the expressed concerns of several state attorneys general of this crime threat, not one of them, except California's attorney general in *Cabazon*, could allege any specific instances of organized crime infiltration into Indian reservations in their states. Indeed, the victory of the Cabazon Band in the recent U.S. Supreme Court decision on this subject indicates that the state, from an evidentiary point of view, has not demonstrated a compelling need for state intrusion into Indian country.

Essentially, the states have made their case for closer regulation of Indian gaming activities on the possibilities of what might happen.⁹³ They rely on the threat of organized crime infiltration, while not realizing that perhaps with federal cooperation, tribes may in time be able to effectively police these activities. Arguments also have been made that lower tribal standards may make policing more difficult.⁹⁴ One commentator, a member of the Nevada Gaming Commission, favors tight control over Indian gambling, arguing that even the legislation heretofore introduced greatly underestimates the complexity of the subject.⁹⁵ His argument for tight federal/state control is premised on his experience in Nevada, which had a history of

89. *Id.*

90. *Id.* at 2.

91. 480 U.S. 202 (1987).

92. *Senate Hearings*, *supra* note 76, at 127.

93. *See id.*

94. *Id.* at 158-60.

95. *Id.*

criminal infiltration until tough regulatory laws were passed.⁹⁶ But the relatively new Indian experience in the area would enable tribes to account for previous non-Indian experiences when enacting their own gambling control ordinances. While corruption in Indian country is possible, as it is elsewhere, that possibility alone should not be seized as a pretext to burden all tribes with heavy federal or state regulation. All proposed legislation has failed to differentiate between those tribes with sophisticated law enforcement systems and those with none at all.

The second, but more subtle state interest in Indian gaming involves a threat to state sovereignty. Simply put, the states have argued that there is no justification for treating gaming activities differently by virtue of their location inside or outside of Indian country.⁹⁷ The argument has been made that a balancing test should be applied between the economic interests of the tribes and the interests of the state in protecting its citizens.⁹⁸ States naturally resent the lack of control of activities within their borders. But it is necessary that the states show some evidence of a compelling need for state regulation, a "test" implicitly reached by dicta in the *Cabazon* case.⁹⁹ In the final analysis, the status of gambling in Indian country, absent federal regulation, has rested on a judicial balancing test of tribal versus neighboring state interests. The days when the reservations were truly isolated from non-Indian communities are long past.

Case Law

Public Law 280 States

In response to the inevitable conflict among the three sovereigns, the courts have applied a variety of tests to attempt to solve the issue. The first test, the prohibitory/regulatory analysis, has its roots as an interpretational aid in Public Law 280 states.¹⁰⁰ One purpose of this law was to attempt to bring some order to the chaos of determining the civil jurisdiction in Indian country. Criminal jurisdiction was, and is, a more settled area of Indian jurisdiction than is the civil side. The law was passed during the termination era of the 1950s, as a way to "mainstream" tribes into state jurisdictional analysis and to ease the federal government out of the "Indian business."

96. *Id.* at 154.

97. H.R. REP. No. 488, 99th Cong., 2d Sess. 31 (1986).

98. *Senate Hearings*, *supra* note 76, at 19.

99. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221 (1987).

100. *See supra* note 11.

The legislative history of Public Law 280 indicates that Congress saw the need to extend state civil jurisdiction into Indian country, because the tribes were not fully developed according to Anglo-American concepts of law.¹⁰¹ Many tribes are, of course, far more "developed" today than they were in 1953.

The first modern case to explore the applicability of Public Law 280 in a civil/regulatory—criminal/prohibitory context was *Bryan v. Itasca County*.¹⁰² That case involved the imposition of a state mobile home tax on an Indian in Indian country. A reading of Public Law 280 could lead to the conclusion that all jurisdiction which is not reserved to the tribes or federal governments such as subjects covered by treaty or matters of taxation, were delegated to the states.¹⁰³ Facially, Public Law 280 grants states "jurisdiction over offenses" and "civil causes of actions" arising in Indian country, and also mandates that state laws shall have the same force and effect in Indian country as they have elsewhere in the state.¹⁰⁴

But *Bryan* rejected such a broad reading of the law. Looking at the law's legislative history, *Bryan* found that a major purpose of the act was to combat lawlessness on the reservations.¹⁰⁵ That court read Public Law 280 in pari materia with the 1950s-era termination acts and determined that if Congress had intended to give states general regulatory powers over Indian tribes, it would have expressly said so.¹⁰⁶ Since the termination acts themselves give states broad jurisdiction over tribal property, and allowed state taxation of income earned in Indian country, it must be presumed that Congress' failure to mention this in Public Law 280 excludes such powers. Such a reading is consistent with the canons of construction, generally construing ambiguous statutes in favor of Indian tribes.¹⁰⁷

Bryan begins to develop the distinction between civil/regulatory and criminal/prohibitory laws for Public Law 280 states. The broad contours of this statute deal with conduct that is proscribed by law; i.e. criminal acts. The very essence of criminal law is to prohibit conduct which is deemed harmful to and by

101. 1953 U.S. CODE CONG. & ADMIN. NEWS 2412.

102. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 362-63 (1982 ed.); *Bryan v. Itasca County*, 426 U.S. 373 (1976).

103. F. COHEN, *supra* note 102, at 363.

104. 18 U.S.C. § 1162(a); 25 U.S.C. §§ 1321(a), 1322(a) (1983); 28 U.S.C. § 1360(a); F. COHEN, *supra* note 102, at 363.

105. *Bryan*, 426 U.S. at 378.

106. *Id.*

107. *Id.* at 378-79.

society. Of course such conduct may also be sanctioned by the imposition of civil penalties. Public Law 280 focuses on behavior which is generally prohibited, as opposed to that which is allowed, with restrictions.

Far less clear in the Public Law 280 case law are regulatory/civil acts which, by definition, may not be activities deemed so harmful that they must be banned altogether. For example, gambling or fireworks use are generally not thought to be so harmful that a total ban is required. Instead, such activities are regulated in order to minimize the harm to people. Such decisions rest on a state's public policy, as embodied in its legislative enactments. But in Public Law 280 states, mere labels are not determinative of whether that law can be used by a state to forbid gambling in Indian country.¹⁰⁸ Such a determination of Public Law 280's applicability to Indian country gambling must be made on a case-by-case basis, analyzing the nature of the applicable state laws involved.

Seminole Tribe of Florida v. Butterworth was just such a case.¹⁰⁹ The case involved the Seminole Tribe's bingo operation in Indian country. The Hollywood, Florida bingo hall is right in the middle of a large metropolitan area, overwhelmingly populated by non-Indians. The state then has a great interest in regulating such an enterprise, both for revenue-taxation and law enforcement reasons. Nonetheless, instead of balancing competing interests, the Fifth Circuit chose to apply a narrow Public Law 280 analysis, Florida having recently assumed total Public Law 280 jurisdiction in Indian country.¹¹⁰ The *Butterworth* court examined Florida gambling laws (particularly those pertaining to bingo) and found a regulatory and not a prohibitory intent in those laws.¹¹¹ Among the factors which militated in favor of the Tribe (a regulatory finding) were: 1) the state allows certain groups to gamble, and 2) the existence of an inference drawn from a reading of those laws that bingo is treated by Florida as a form of recreation, albeit closely regulated.¹¹² The *Butterworth* court found that a prohibitory interpretation of the Florida gaming laws could be implied—but using the canons of construction, it construed the ambiguities in favor of the Indians.¹¹³ Once that court reached the opinion that Florida bingo

108. *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981).

109. *Id.*

110. FLA. STAT. ANN. § 285.16 (West 1975).

111. *Butterworth*, 658 F.2d at 316.

112. *Id.* at 314.

113. *Id.*

gambling laws were civil/regulatory in nature, the racial identity of the parties, whether they be game operators or players, became irrelevant.¹¹⁴ From the *Butterworth* case, it appears that when the law in question is found to be civil/regulatory in nature, the states are excluded from enforcing their bingo ordinances, even if the operators are non-Indian, as was the fact in this case.

Wisconsin, another Public Law 280 state, similarly lost its case in *Lac du Flambeau Band v. Williquette*.¹¹⁵ That state had a stronger case than did Florida. It historically had prohibited all forms of gambling, punishing violations with criminal sanctions including imprisonment.¹¹⁶ Wisconsin's undoing was a recent state constitutional amendment, which exempted bingo and raffles from the gambling prohibition. In response to this change, the Lac du Flambeaus established a bingo hall on their lands in Indian country, and the state subsequently attempted to assert jurisdiction over such activity. The games conducted by the Lac du Flambeaus were precisely those permitted by the state and though the games were not state licensed, the court concluded that the Wisconsin bingo laws were civil/regulatory in nature, not the type of laws envisioned in the grant of Public Law 280 jurisdiction to the state.¹¹⁷

Lac du Flambeau followed *Oneida Tribe of Indians of Wisconsin v. State of Wisconsin*, which earlier had reached the same result over state bingo laws.¹¹⁸ *Oneida* also analyzed the state public policy and gambling laws, concluding that Public Law 280 jurisdiction must be denied Wisconsin in relation to gambling in Indian country.¹¹⁹

California, a third Public Law 280 state, similarly lost several cases which addressed this same issue. The first case involved was *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, where under slightly different facts, the Indians prevailed. Unlike the previous cases mentioned, the Barona Indians lived on a very small reservation, with few enrolled members.¹²⁰ That court followed earlier decisions, ascertaining the intent and

114. *Id.*

115. *Lac du Flambeau Band v. Williquette*, 629 F. Supp. 689 (W.D.Wis. 1986).

116. *Id.* at 691.

117. *Id.* at 692-93.

118. *Oneida Tribe of Indians of Wisconsin v. State of Wisconsin*, 518 F. Supp. 719 (W.D.Wis. 1981).

119. *Id.*

120. *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185, 1187 (9th Cir. 1982), *cert. denied* 461 U.S. 929 (1983).

effect of the state gambling laws, whether or not such gambling was permitted elsewhere in the state, applying the canons, and finally, accounting for the historical disfavor of state jurisdiction in Indian country, to find no state jurisdiction in this case.¹²¹

Recently, in *California v. Cabazon Band of Mission Indians*, the United States Supreme Court upheld the criminal/prohibitory—civil/regulatory analysis as applied to Public Law 280 states.¹²² The two bands of Indians (Morongo and Cabazon) in this case, like those in *Barona*, were small, the Cabazon with twenty-five members and the Morongo with 730 members.¹²³ These bands conducted card and bingo games pursuant to tribal ordinance. The state sought to prohibit such games under both Public Law 280 and the OCCA.

In construing section 4 of Public Law 280,¹²⁴ which grants limited civil jurisdiction in Indian country to the state, the Court followed its earlier analysis in *Bryan* by looking at the legislative history of the law to determine that section 4 applied only to private civil litigation involving Indians.¹²⁵ *Bryan* involved a tax, unquestionably civil in nature. However, gambling can easily be considered both civil and criminal in nature, depending on a state's public policy towards such activity. With respect to Public Law 280, *Cabazon* held that whether the [gambling] conduct violates state public policy is the first test.¹²⁶ *Cabazon*, as in numerous cases below, reviewed the state's widespread tolerance and encouragement of gambling—as manifested in the presence of a state lottery, pari-mutual horse racing, and numerous private bingo halls—and found that California's bingo laws are essentially civil/regulatory in nature.¹²⁷

The state also attempted to argue that the presence of criminal sanctions in the bingo laws permit a criminal/prohibitory label to attach to such laws. The *Cabazon* court rejected such reasoning on the same grounds as did the *Butterworth* court.¹²⁸ The Supreme Court, adopting the *Butterworth* logic, reasoned that to permit such a result of labelling would permit a Public Law 280 state to merge tribal sovereignty into its own.¹²⁹ Such

121. *Id.* at 1190.

122. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987).

123. *Id.* at 209 n.1.

124. 28 U.S.C. § 1360(a).

125. *Cabazon*, 480 U.S. at 207-08.

126. *Id.* at 209.

127. *Id.*

128. *Id.*

129. *Id.*

a scenario, given the history of state-Indian relations, would allow a state, under the rubric of Public Law 280, to reverse decades of federal Indian policy. All that the state need do to prevent the tribe from exercising its own jurisdiction in Indian country is to attach criminal sanctions to any laws it wishes to apply there. Inherent tribal sovereignty would then mean virtually nothing as a Public Law 280 state could then unilaterally extend its jurisdiction into Indian country.

Arguably, the 1968 Indian Civil Rights Act (ICRA)¹³⁰ could then operate to prevent such a result. The ICRA, which amended Public Law 280, required tribal consent to any further assumption of state jurisdiction in Indian country. No tribe that wants to establish gaming would likely assent to this.

Finally, once such laws are found to be regulatory in nature, the state is without jurisdiction in Indian country over any players or operators of gambling enterprises, whether or not they are Indian. The facts of *Cabazon* seem to indicate that all that is needed for immunity from regulation by a Public Law 280 state is a tribal ordinance controlling the gambling and state tolerance, however limited, of that activity. The site of the operation must meet the Indian country analysis of 18 U.S.C. § 1151 in order for the regulatory/prohibitory Public Law 280 analysis to be applied. If the site of the gaming is not in Indian country, then of course it would be subject to state jurisdiction like any other entity. While 18 U.S.C. § 1151 is a criminal jurisdictional statute, the Supreme Court in *DeCoteau v. District County Court*¹³¹ and *McClanahan v. State Tax Commission of Arizona*¹³² have held the section 1151 Indian country definition to apply also to questions of federal and tribal civil jurisdiction.¹³³ It appears then that the law is now relatively well settled, with respect to Indian country gambling issues in Public Law 280 states.

Non-Public Law 280 States with Special Jurisdictional Acts

It should be noted, however, that Public Law 280 applies only to a minority of states. What then is the rule in non-Public Law 280 states? Some of these states have special jurisdictional acts of Congress which authorize state criminal and/or civil jurisdiction in Indian country.

130. 25 U.S.C. §§ 1301-1341.

131. *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

132. *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973).

133. F. COHEN, *supra* note 102, at 27.

For example, in *Penobscot Nation v. Stilphen*, the state relied upon the Maine Indian Claims Settlement Act of 1980 (MICA),¹³⁴ to preclude the Penobscots, a federally recognized tribe, from operating a high stakes beano parlor on its newly-established reservation.¹³⁵ That court rested its decision of state jurisdiction in Indian country on an interpretation of the state implementing act (authorized under MICA), which allows tribes exclusive jurisdiction only over "internal tribal matters."¹³⁶ Such "internal tribal matters" under title 30, section 6204 of the M.R.S.A., part of the state's Maine Implementing Act, did not mention gaming, traditional or otherwise, and the court did not find the conduct of beano to so qualify.¹³⁷ The *Stilphen* court relied on the fact that beano is not a traditional Indian game, nor "did it have any particular cultural significance to the [Penobscot] Nation."¹³⁸ The fact that the proceeds of the games were used to finance tribal activities did not qualify the games as internal tribal matters.¹³⁹ The Supreme Court dismissed an appeal of the Penobscot Nation on the grounds of a lack of a substantial federal question.¹⁴⁰

Kansas, another non-Public Law 280 state, in *Iowa Tribe of Indians v. State of Kansas* also successfully assumed jurisdiction over the Iowa Tribe for the state law offense of selling pull-tabs cards (in connection with bingo games) on the reservation.¹⁴¹ The state relied on the Kansas Act of 1940,¹⁴² which gives the state jurisdiction over those crimes (so-called minor acts) not enumerated in the federal Major Crimes Act.¹⁴³ *Iowa Tribe* relied heavily on the legislative history of the Kansas Act to find that Congress meant to cede jurisdiction to the state for such "minor acts" and also that the tribes in Kansas do not possess and have not for many years possessed tribal courts.¹⁴⁴ In effect the *Iowa Tribe* court believed that the 1940 Act was passed to fill a void in tribal law enforcement in Kansas.¹⁴⁵ But that holding poses

134. Pub. L. 96-420, 94 Stat. 1785 (codified at 25 U.S.C. § 1721-1735).

135. *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me. 1983).

136. *Id.*

137. *Id.* at 490.

138. *Id.*

139. *Id.*

140. 464 U.S. 923 (1983).

141. *Iowa Tribe of Indians v. State of Kansas*, 787 F.2d 1434 (10th Cir. 1986).

142. 25 U.S.C. § 217(a) (1940).

143. Act of June 25, 1948, ch. 645, 62 Stat. 758 (codified at 18 U.S.C. 1153, 3242).

144. *Iowa*, 787 F.2d at 1439.

145. *Id.* at 1439-40.

trouble for the oft-subscribed notion in federal Indian law of inherent tribal sovereignty. True sovereignty does not necessarily imply that the failure to exercise authority (i.e. the absence of tribal courts), causes tribes to lose that authority. No sovereign necessarily loses power by the failure to exercise its authority. Yet that is exactly what has happened here.

The state of Connecticut did not fare so well in *Mashantucket Pequot Tribe v. McGuigan*.¹⁴⁶ Although Connecticut is not a Public Law 280 state, the *McGuigan* court nonetheless applied the regulatory/prohibitory analysis to determine that the state bingo laws only serve to regulate, not prohibit, bingo in that state.¹⁴⁷ The court employed that analysis because the Mashantucket Pequot Indian Claims Settlement Act¹⁴⁸ parallels Public Law 280's grant of "limited civil jurisdiction" to the states.¹⁴⁹ Thus, the act falls into that category of states covered by special Congressional enactments which cede to the state certain jurisdiction over Indian tribes in Indian country. The act was passed to settle land claims of the Indians there. The law established, inter alia, a new reservation in exchange for the extinguishment of long-standing land claims against the state and federal governments. So far, all cases examined involved either Public Law 280 states or those states with special jurisdictional acts of Congress.

States Without Public Law 280 or Special Jurisdictional Acts

The final group of states which remain subject to an analysis of state jurisdiction are all of the other non-Public Law 280 states—those without special jurisdictional statutes. The basis for an assumption of state jurisdiction, under these circumstances, is far less clear than it is in Public Law 280 states, now that the Supreme Court has spoken in the *Cabazon* case. The four basic theories advanced in these cases are an infringement on tribal sovereignty, the balancing of tribal/state/federal interests, the OCCA, and preemption. As is true of many issues in Indian law, there is no single standard or test which the federal or state courts apply.

In *State ex rel. May v. Seneca-Cayuga Tribe*, a state court decision, the Seneca Tribe won only a partial victory.¹⁵⁰ The

146. 626 F. Supp. 245 (D.Conn. 1986).

147. *Id.* at 246.

148. Pub. L. 98-134, 97 Stat. 851 (1983) (codified at 25 U.S.C. §§ 1751-1760).

149. *McGuigan*, 626 F. Supp. at 248.

150. *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985).

Oklahoma Supreme Court would permit state regulation of tribal bingo activities only to the extent that it affected non-member Indians or non-Indians.¹⁵¹ By implication, then, member Indians involved in bingo are free of state regulation over such activities. That court allowed limited state jurisdiction under a balancing of the interests test, asserting that the state need for revenues and protection of Oklahomans from organized crime justifies limited state jurisdiction in Indian country.¹⁵²

In *May*, preemption and infringement are summarily dismissed, the latter on the ground that bingo is not a "traditional tribal activity."¹⁵³ The court, in attempting to balance the interests of all sovereigns, acknowledged the tribe's need for economic self-development, but not at the expense of the state.¹⁵⁴ From a full reading of the case, based on what was discussed (balancing), and what was not (infringement or preemption), it is clear that the court was seizing upon any possible pretext to permit some state jurisdiction over these activities. In *May*, the state of Oklahoma did not appear to argue any compelling needs of the state such as tax revenue or a problem with organized crime. The lack of any meaningful discussion of these legitimate state interests, given the fact that the state relied on a balancing approach, is puzzling.

Another argument advanced by states is the applicability of the OCCA to Indian country. But federal court decisions have consistently held that while the OCCA makes gambling in federal enclaves a federal crime, if such activity is unlawful in the host state, the act cannot be used by state officials to assert state jurisdiction in Indian country.¹⁵⁵ In *United States v. Dakota*, the United States, not the state of Michigan, brought a declaratory action against the Keweenaw Indian Bay Community for operating a gambling casino on its reservation.¹⁵⁶ That court declined to apply the Public Law 280 civil/criminal analysis, as Michigan is a non-Public Law 280 state.¹⁵⁷ Simply put, the court found that the casino violated state law, and therefore, the OCCA. Similarly, in *Farris*, the Ninth Circuit upheld the convictions of both non-Indians and member Indians for a violation

151. *Id.* at 92.

152. *Id.* at 91.

153. *Id.* at 90.

154. *Id.* at 90-91.

155. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 210-11 (1987); *United States v. Dakota*, 796 F.2d 186, 186 (6th Cir. 1986).

156. *Dakota*, 796 F.2d at 186.

157. *Id.* at 189.

of the OCCA.¹⁵⁸ That court, notwithstanding the special tribal/federal trust relationship, or more specifically, the canons of construction, found that the OCCA, like other federal laws of general application throughout the United States, applies with equal force in Indian country.¹⁵⁹ In dicta, *Cabazon* permits only the federal government to apply the OCCA in Indian country.¹⁶⁰

As to infringement analysis in non-Public Law 280 states, both *Farris* and *Cabazon* make it clear that the *Williams v. Lee* infringement test is inapplicable to a federal application of the OCCA in Indian country.¹⁶¹ The *Williams* case concerned the attempted exercise of state jurisdiction on an Indian reservation. It noted the historical tension between state and tribal governments. But the OCCA is an exercise of federal, not state authority. States have virtually nothing to say about the enforcement of that act.

The next argument used by both tribes and states is that of preemption. Generally, preemption may be found to exist where a tribe or the federal government has a long or consistent history of self-regulation over the particular subject matter.¹⁶²

In *Farris*, the appellants argued that 15 U.S.C. § 1175 of the federal Gambling Devices Act served as a basis of federal preemption of an application of the OCCA. That court, however, rejected such an argument, primarily on the basis that section 1175 applies only to slot machines, while the OCCA applies to gambling in general.¹⁶³

A much better argument for federal/tribal preemption of state gambling laws in non-Public Law 280 states was made by defendants-appellees in *Langley v. Ryder (Langley I)*.¹⁶⁴ In that case, the defendants were arrested for gambling and other charges on the Alabama-Coushatta "reservation," near Shreveport, Louisiana. While the Coushatta lands were not an actual reservation, they were treated as Indian country for the purposes of this action. The *Langley I* court found for the preemption of state laws on several grounds.¹⁶⁵ The first base of preemption used was the Indian Commerce Clause,¹⁶⁶ which generally pre-

158. *United States v. Farris*, 624 F.2d 890, 890 (9th Cir. 1980).

159. *Id.* at 896.

160. *Cabazon*, 480 U.S. at 213.

161. *Id.*; *Farris*, 624 F.2d at 896.

162. *Rice v. Rehner*, 463 U.S. 713, *rehearing denied*, 464 U.S. 874 (1983).

163. *Farris*, 624 F.2d at 896.

164. *Langley v. Ryder [I]*, 602 F. Supp. 335 (W.D.La. 1985).

165. *Id.*

166. U.S. CONST. art. I, § 8, cl. 3.

empts state regulation of Indian affairs.¹⁶⁷ However, the court bowed to the realities of close contact between whites and Indians at the present time, tracing the softening of preemption through *Williams*¹⁶⁸ and *McClanahan*,¹⁶⁹ which permit state jurisdiction under certain conditions, even at the cost of some measure of tribal sovereignty.¹⁷⁰ Under the pressure of increasing close Indian-white contact, preemption nearly dissolves into a balancing test. *Langley I* found no particular overriding state interest, such as the "lost revenue" arguments made by Arizona in *McClanahan*.¹⁷¹ The latter case found the state asserting a great interest in lost revenue, if that state could not tax income earned by an Indian off the reservation. The crux of the state argument in *McClanahan* was that the state provides services to Indians both on and off the reservations.¹⁷²

But in *Langley I*, the state of Louisiana asserted no interests which might counter the preemption arguments of the defendants.¹⁷³ It was difficult to imagine why the state failed to argue the existence of state interests. Nonetheless, in *Langley v. Ryder (Langley II)*, the state appealed the lower court finding of federal preemption of state law, and ultimately lost to the Coushatta Tribe.¹⁷⁴ The Fifth Circuit adopted the lower court's analysis of preemption.¹⁷⁵ Reflecting the state's failure to assert any compelling state interests in the conduct of bingo within Indian country, *Langley II* affirmed the district court in all respects.¹⁷⁶ The essence of *Langley II* was that there was no effective Congressional grant of jurisdiction to Louisiana within Indian country in order to defeat federal preemption, and thus vesting jurisdiction in Louisiana.¹⁷⁷

In a state without Public Law 280 or a special jurisdictional act of Congress, the *Langley* cases offer a reasonably good basis for an Indian tribe to assert a tribal/federal preemption of state jurisdiction over tribal affairs. The Coushatta Tribe was a recently recognized tribe, on lands which were not in fact an

167. *Langley I*, 602 F. Supp. at 343.

168. *Williams v. Lee*, 358 U.S. 217 (1959).

169. *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1973).

170. *Langley I*, 602 F. Supp. at 343.

171. *Id.*

172. *McClanahan*, 411 U.S. at 164.

173. *Langley I*, 602 F. Supp. at 335.

174. *Langley v. Ryder [II]*, 778 F.2d 1096 (5th Cir. 1985).

175. *Id.*

176. *Id.*

177. *Id.*

established reservation in the usual sense. The land was donated to the Tribe and subsequently accepted for them by the United States Department of the Interior, in trust for the tribe as authorized by section 5 of the Indian Reorganization Act of 1934.¹⁷⁸ The current federal posture of permitting Indian gaming enterprises on reservations in the name of economic development suggests that the states will get little help in enforcing laws with respect to Indian-controlled gambling in Indian country.

However, the preemption test is not without limits. This test no longer rests on a *Williams v. Lee* analysis, but rather a balancing test, as the dicta in *Cabazon* suggests.¹⁷⁹ That case balanced the ample evidence of strong federal interests, manifested by President Reagan's emphasis of tribal freedom from federal dependence, and a general federal promotion of bingo enterprises as against the state interests of containing organized crime.¹⁸⁰

At first blush, it appears that these tribal interests might be diminished by the *Washington v. Confederated Tribes of the Colville Reservation* proscription against the mere "marketing of tax exemptions." But *Cabazon* distinguished *Colville* on the basis that the tribes there have significant interests not present in the latter case.¹⁸¹ The material distinction in fact between these two cases on this point is that in *Colville*, the tribes merely imported cigarettes for later resale, where in *Cabazon*, the tribes committed significant financial resources and manpower towards the conduct of these gaming activities. In the earlier case, the tribes had already-existing smoke shops with no additional investment necessary in order to accommodate the cigarettes. The present case goes far beyond merely taking advantage of tax free status. In fact, the states argument is focused not on taxation but the infiltration of organized crime. The case extends to the creation of a new industry on the California rancherias, that of recreation.

But this distinction exists only because the *Cabazon* case chose to deemphasize the marketing of tax exemption argument. Had the Supreme Court chose to follow *McClanahan* in this respect, the two cases are quite analogous. Both *McClanahan* and *Cabazon* in fact involve the marketing of an exemption from state

178. *Id.*

179. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221 (1987).

180. *Id.* at 211.

181. *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980); *Cabazon*, 480 U.S. at 215-16.

regulation. The former case involved state taxation of the reservation sale of cigarettes, while the latter case involves state regulation of bingo establishments. In both cases, non-Indians would have no reason to patronize the Indian country businesses if they were subject to state regulation, either in the form of state taxes or the size of bingo jackpots. If the Court had found the marketing argument strong, *McClanahan* would have served as strong ammunition for the state of California.

The final analysis of the preemption/balancing test lies in the nature of the interests the state of California asserted in an attempt to demonstrate a compelling state interest, which would be enough to override tribal and federal interests. In *Cabazon*, the state's assertion of a compelling state interest failed on evidentiary grounds.¹⁸² The state felt that the threat of organized crime on the two reservations in this case was sufficient to escape preemption. The Court, in *Cabazon*, found that argument unpersuasive for two reasons: 1) no actual proof was offered at trial that regulated off reservation games were free from organized crime and Indian country games weren't, and 2) the state didn't show that organized crime infiltration actually existed with respect to bingo and similar games, either on or off the reservation.¹⁸³ Such a lack of proof of the existence of organized crime or other law enforcement problems also existed in the *Cabazon* case at the Ninth Circuit level.¹⁸⁴ This same failure of proof existed both in the *Langley* cases and in recent congressional hearings on the subject.

Implicit in all of this is that with strong facts, where the state failed on a Public Law 280 analysis of their bingo statutes, they might have prevailed on a preemption or balancing test basis. As to preemption, Louisiana, like all other states, has a long history of gambling regulation. The *Langley* cases also suffered from this lack of proof. If Louisiana, a non-Public Law 280 state, had shown strong evidence of existing law enforcement problems, it could have made a credible case against federal preemption of state gambling laws. The *Cabazon* holding already implies that with solid evidence of past and/or present law enforcement problems, the state might have prevailed.¹⁸⁵ A showing of a compelling state interest might have also overcome the

182. *Cabazon*, 480 U.S. at 219-21.

183. *Id.* at 221.

184. *Cabazon Band of Mission Indians v. County of Riverside*, 783 F.2d 900 (9th Cir. 1986).

185. *Cabazon*, 480 U.S. at 202.

infringement test. In the context of Indian-white contact, the state almost automatically wins on a pure balancing of interests test, as most reservation populations are vastly outnumbered by the neighboring communities. In light of long standing rational and oft-demonstrated state and federal/tribal interests, a strong state showing could prevail, as it did in *McClanahan*.

Conclusion

In predicting the future, the first step is to consider whether or not a given reservation (or land which meets Indian country definitions) is in a Public Law 280 state, a state which has specifically assumed some measure of criminal jurisdiction over the tribes. If so, absent congressional regulation of Indian gambling (as embodied in recent legislative proposals), the tribe's success will surely depend on whether or not the state permits the gaming activity which the tribe seeks to engage in. No cases have supported an exclusion of state jurisdiction in Indian country where the Public Law 280 state has totally prohibited that form of gambling. The *Cabazon* case infers that a total ban on such activities, even without proof of law enforcement problems, may be enough to permit state jurisdiction in Indian country.

Such a total ban would seriously weaken the preemption/balancing tests from the tribe's viewpoint. A non-gambling state would be able to point to a compelling need to maintain a gambling-free state. Permitting gambling, even in Indian country, would seriously weaken these state goals. A Public Law 280 analysis would, under *Seminole* and *Cabazon* rules, compel a decision in favor of a state. A total ban on such activities would take the state gambling law out of the civil/regulatory category and put it squarely into the criminal/prohibitory column—precisely the types of laws addressed by both the legislative history of Public Law 280 and *Bryan*.

A total ban on gambling would also support any federal effort to halt gambling under the OCCA. This act could be applied to the reservation, but only by the federal government. However, existing federal policy makes any widespread federal prosecutions under the OCCA unlikely.

Like it or not, the concept of inherent tribal sovereignty, at least in the gambling context, has been considered softened since the heady days of *Williams v. Lee*, where the infringement test placed a heavy burden on the states to overcome, which could be done only by showing some compelling state interest, such as a need to uphold law and order by applying state criminal

law to reservations. This same burden also exists to some degree in the balancing test and the canons of construction.

Cabazon is merely a continuance of a gradually discernable trend of reducing tribal sovereignty in order to meet the exigencies of state interests. These exigencies manifest themselves as a result of ever increasing contact between whites and Indians. To move too fast against tribes (as was the case with the Termination Acts) would offend the sensibilities of all but the most ardent supporters of states (as opposed to Indian) rights.

The Public Law 280 analysis then becomes subsumed into the larger picture of competing state, federal, and tribal interests, in the name of infringement or balancing/preemption tests. The Supreme Court's message in *Cabazon* appears to be that the Court stands ready, upon a good factual showing of compelling state interests, to blunt or jettison that Public Law 280 analysis in favor of a straight balancing-of-the-interests test. The Court surely indicated by inference, at least, that a strong factual showing of law enforcement problems by the state would have been enough to balance the interests in favor of state jurisdiction in Indian country.

The one sure fact of Indian law is that it is a fluid concept, subject to few permanent and enduring concepts. More than other areas of the law, Indian law is "fact driven." One only needs to look at both the courts and Congress to discern that fact. Tribal sovereignty, though never in fact unlimited after the Marshall Trilogy, is subject to gradual erosion as Indians and non-Indians live closer together, in ever-increasing numbers. As always, Indian rights, Public Law 280 or not, are either directly or indirectly dependent upon state law.

Addendum: An Update

Federal regulation of gambling in Indian Country has become a reality. On Oct. 17, 1988, President Reagan signed the Indian Gaming Regulatory Act (IGRA) into law.¹⁸⁶ The IGRA originated as Senate Bill 555, which was introduced in the first session of the 100th Congress, and subsequently amended. The major features of the IGRA were discussed previously in this article.

The one major difference between Senate Bill 555 and the IGRA concerns the issue of a transfer of criminal and civil jurisdiction from the tribe to the state, as it relates to gaming disputes. Under the original bill, a tribe wanting to conduct Class III gaming had to seek a transfer of civil and criminal jurisdiction from itself to the state. The tribe had to get Secretarial approval for this, and in fact, the Secretary was to be the vehicle for effecting the transfer. Under section 11(d) of the original Senate Bill 555,¹⁸⁷ in order for the tribe to conduct such gaming, the Secretary had to approve and, indeed, ask the state to assume jurisdiction over gambling related matters. The effect of this section would have put the tribe in the position of surrendering another piece of their sovereignty to the state as the price of conducting Class III gambling. The IGRA does not place the tribes in such a position.

To conduct Class III gambling, the IGRA still requires the tribes to adopt a gaming ordinance in conformity with the act, and the measure must then be approved by the Commission Chairman.¹⁸⁸ However, instead of the Secretary transferring jurisdiction from the tribe to the state, the tribe and state must now negotiate and agree to a compact which would govern both the actual conduct of the games and the allocation of related civil and criminal jurisdiction in Indian country. Such jurisdiction as assumed by the state, pursuant to the act, only allows the state to assess its law enforcement costs against the tribal Class III game.¹⁸⁹ Under the IGRA, the state is expressly forbidden to use the compact as precedent for imposing any revenue-raising taxes or assessment on any activities in Indian country, whether gambling-related or not, if there is no other legal basis for imposing such a tax or assessment.¹⁹⁰ In other

186. Indian Gaming Regulatory Act, Pub. L. 100-497, 102 Stat. 2467, 1988 U.S. CODE CONG. & ADMIN. NEWS 3071, (to be codified at 25 U.S.C. §§ 2701-2721, 18 U.S.C. 1166-1168).

187. S. 555, 100th Cong., 1st Sess., § 11(d) (1987).

188. Pub. L. 100-497, § 11(d)(1).

189. *Id.* § 11(d)(4).

190. *Id.*

words, a state is prevented from using the compact as a legal basis to collect taxes on other activities which take place in Indian country.

The burden to negotiate such a compact in good faith is initially shifted to the state. A tribe may seek an order from the appropriate federal district court to compel the recalcitrant state to negotiate in good faith for a compact.¹⁹¹ The IGRA enumerates several factors for the court to consider in determining exactly what "good faith" means in this context. The IGRA also contains provisions for a mediation process to develop a compact in the event that both parties reach an impasse in their negotiations.¹⁹²

In essence, the IGRA seeks to avoid the "all or nothing" result of transferring jurisdiction to the state at the expense of tribal sovereignty. This new approach mirrors the desire of Congress to strengthen the hand of the tribes in dealing with the jurisdiction issue.¹⁹³ Congress balanced the state concerns of crime prevention with the tribe's historic and continuing opposition to any imposition of state jurisdiction into tribal lands.¹⁹⁴ The IGRA now gives the tribes a significant voice as to the nature of state jurisdiction on gambling in Indian country.

Other differences are of a relatively minor nature, focusing mainly on exempting particular lands from provisions of the IGRA. At this point it is interesting to note that the revised version of Senate Bill 555¹⁹⁵ provided that a majority of the Commission members were to be members of federally-recognized tribes. The enacted version of Senate Bill 555, the IGRA, deleted that provision, leaving Indian members in a minority of two.¹⁹⁶ Nothing would prevent the President, of course, from appointing more than two Indian members to the Commission. One can only speculate as to the reasons why a provision calling for majority Indian membership on the Commission was deleted. Only time will tell how well the IGRA, discussed in Congress for over five years, actually works. At least the tribes and the states now have a framework in which to solve their differences over who should regulate gambling in Indian Country.

191. *Id.* § 11(d)(2)(B)(iii).

192. *Id.* § 11(d)(7).

193. S. REP. NO. 446, 100th Cong., 2d Sess. 13, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 3083.

194. *Id.*

195. S. 444, 100th Cong., 2d Sess. § 5(b)(3) (1988).

196. Pub. L. 100-497, § 5(b)(3).

